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IN THE

Supreme Court Of The United States

October Term, 1995

MARTIN H. DROZ,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Anne-Marie Amiel
Counsel of Record
Dean L. Whitford
John W. Whitehead
The Rutherford Institute
1445 E. Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

Attorneys for *Amicus Curiae*

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BRIEF OF THE RUTHERFORD INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Rutherford Institute respectfully submits this brief as *amicus curiae* in support of the petition for writ of certiorari filed by the petitioner, Martin H. Droz. Pursuant to Supreme Court Rule 37.2, the parties have consented to the filing of this brief. The written consents have been filed with the Clerk of the Supreme Court.

INTEREST OF *AMICUS CURIAE*

The Rutherford Institute is an international non-profit religious legal defense organization named after Samuel Rutherford, a 17th-century Scottish minister and Rector at St. Andrews University who resisted the idea of the divine right of kings. In his book, *Lex Rex*, Rutherford argued that all people are subject

to the law — including the king. The Rutherford Institute provides *pro bono* defense to religious persons in order to obtain for them equal justice under the rule of law, particularly in cases where the government is a party. The Rutherford Institute is non-sectarian, defending anyone regardless of religious faith.

Formed in 1982, The Rutherford Institute has provided *pro bono* legal defense to religious persons where they experience disparate treatment as a result of membership or non-membership in religious organizations. For example, The Institute represented William Frazee *pro bono* in his case before this Court challenging the denial of unemployment benefits because he was not a member of a recognized religious organization with beliefs regarding Sabbath observance. *See Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). The Institute specializes in litigation in state and federal courts and has participated as counsel in numerous other cases before this Court. Counsel believe their expertise will be of assistance to the Court in this case.

The accompanying brief brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties. *First*, the brief calls to the attention of the Court a conflict with the decision of another United States court of appeals regarding the level of scrutiny applied under the Establishment Clause to laws conditioning the receipt of a government benefit upon membership in a recognized religious sect. *Second*, the brief calls to the attention of the Court an important question of federal law which has not been, but should be, settled by this Court: Does the Religious Freedom Restoration Act of 1993 (RFRA) merely incorporate by reference this Court's pre-*Smith* free exercise jurisprudence? *Third*, the brief calls upon the Court to vacate summarily the Establishment Clause and RFRA portions of the decision of the Court of Appeals and to remand the case for reconsideration of the foregoing issues.

SUMMARY OF ARGUMENT

The First Amendment of the United States Constitution and the Religious Freedom Restoration Act of 1993 prohibit government from conditioning exemptions from public obligations upon membership in a religious organization. In *Frazee v. Illinois Department of Employment Security*, this Court held that a state may not condition the allowance of unemployment benefits upon the claimant's membership in a religious organization teaching Sabbath observance. In *Wilson v. N.L.R.B.*, the United States Court of Appeals for the Sixth Circuit held that Congress could not condition exemption from the payment of union dues upon the employee's membership in a religious organization teaching non-payment of union dues. In this case, however, the United States Court of Appeals for the Ninth Circuit has held that Congress may condition exemption from the payment of Social Security taxes upon the employee's membership in a religious organization opposed to the payment of such taxes. The decision conflicts with the First Amendment of the United States Constitution, the Religious Freedom Restoration Act of 1993, and decisions of this Court and the United States Court of Appeals for the Sixth Circuit.

The decision of the Court of Appeals also fails to give proper scope and dimension to Petitioner's rights under the Religious Freedom Restoration Act of 1993 ("RFRA"). The Court of Appeals determined that pre-*Smith* decisions under the First Amendment are reliable *and controlling* authority for determining Petitioner's rights under RFRA and never considered Petitioner's claim under the particular language of the statute. RFRA mandates, however, consideration of Petitioner's claim in light of the particular language of the statute and Congress' expressed intent to restore the compelling state interest test *as set forth in Sherbert v. Verner* and *Wisconsin v. Yoder*. This Court should remand this case to the Court of Appeals for consideration of Petitioner's rights under RFRA.

The Petition for Certiorari should be granted in light of the reasons set forth in Supreme Court Rule 10.1(a) and (c).

ARGUMENT

I. The decision of the Ninth Circuit conflicts with the decision of another United States court of appeals regarding the level of scrutiny applied under the Establishment Clause to laws conditioning the receipt of a government benefit upon membership in a recognized religious sect.

The decision of the Court of Appeals conflicts with an Establishment Clause decision of the Sixth Circuit applying strict scrutiny to an Act of Congress conditioning an exemption upon membership in a "bona fide" religious organization. *See Wilson v. N.L.R.B.*, 920 F.2d 1282 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992). *Wilson* involved an Establishment Clause challenge to Section 19 of the National Labor Relations Act, 29 U.S.C. § 169. *See* 920 F.2d at 1285. Section 19 of the NLRA exempts from payment of union dues only members of a "bona fide religion, body, or sect which has historically held conscientious objections" to joining or financially supporting labor organizations. *See* 29 U.S.C. § 169.

Although both parties in *Wilson* argued that the statute should be evaluated under the three-pronged Establishment Clause inquiry derived from this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Sixth Circuit concluded that the statute was subject to strict scrutiny under *Larson v. Valente*, 456 U.S. 228 (1982). 920 F.2d at 1286. The court held that "section 19 facially discriminates among religions because it exempts from union membership only those employees who are members of 'bona fide' religious organizations having the beliefs described in the statute." 920 F.2d at 1287. Applying strict scrutiny, the court held that Section 19 violated the Establishment Clause by exempting "members only" because that provision lacked a compelling governmental interest and could be more closely fitted to accomplish the government's interest

without regard to membership in particular religious organizations. *See id.*

In considering Petitioner's Establishment Clause claim, the Ninth Circuit expressly refused to apply strict scrutiny to a federal law exempting from payment of Social Security taxes only members of a "recognized religious sect" having the beliefs described in the statute. *See Droz v. Commissioner of Internal Revenue Service*, 48 F.3d 1120, 1124 (9th Cir. 1995); 26 U.S.C. § 1402 (g) (1). Like the statute in *Wilson*, however, Section 1402 (g) facially discriminates among religions — it creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.[1] Individual taxpayers having the same beliefs are not entitled to the same benefit.[2]

Therefore, a conflict with a decision of another United States court of appeals exists: the Sixth Circuit applied strict scrutiny under *Larson* to a federal statute exempting only members of recognized religious sects while the Ninth Circuit did not do so. Under Rule 10.1(a) of the Rules of the Supreme Court of the United States, special and important reasons therefore exist for the exercise of the Court's discretion in granting the Petition.

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[1] The reasons stated by the Ninth Circuit for refusing to apply strict scrutiny under Larson (to wit, that Section 1402(g) grants a religious exemption subject to a condition and was not intended to discriminate among religions) would apply to Section 19 of the NLRA as well.

[2] It should be noted that the Ninth Circuit's application of heightened scrutiny to Section 1402 (g) in the context of the Free Exercise claim does not resolve the Establishment Clause question. *Cf. Wilson*, 920 F.2d at 1289-90 (although a legislative exemption may violate the Establishment Clause, the Free Exercise Clause may not require an exemption).

II. The Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court in *Larson*, *Amos*, and *Frazee* by concluding that a law conditioning its applicability upon membership in a religious sect is not subject to strict scrutiny.

Under *Larson v. Valente*, 456 U.S. 228 (1982), the initial inquiry in claims of denominational preference is whether the law facially differentiates among religions. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 695 (1989); *Larson*, 456 U.S. at 247. If no facial preference exists, then the Court applies the three-pronged Establishment Clause inquiry of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). As stated in *Amos*, "*Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon*." *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987) (emphasis in original).

Section 1402 (g) facially discriminates among religions because it exempts from payment of Social Security taxes only those taxpayers who are members of a "recognized religious sect" having the beliefs described in the statute. Individual taxpayers having the same beliefs are not entitled to the same benefit. Thus, Section 1402 (g) creates a denominational preference by conferring a benefit on members of the religious organizations described in the statute.

In considering the Establishment Clause claim, the Court of Appeals expressly refused to apply strict scrutiny to Section 1402 (g). *See* 48 F.3d at 1124. The decision of the Court of Appeals therefore conflicts with the decisions of this Court in *Larson* and *Amos*. The decision also conflicts with the decision of this Court in *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). Although *Frazee* was decided in the context of a free exercise claim, the case stands for the proposition that heightened scrutiny applies to governmental

programs conditioning the receipt of benefits upon membership in a religious sect. Therefore, under Rule 10.1(c) of the Rules of the Supreme Court of the United States, special and important reasons exist for the exercise of the Court's discretion in granting the Petition.

III. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court: Does the Religious Freedom Restoration Act of 1993 (RFRA) merely incorporate by reference this Court's pre-*Smith* free exercise jurisprudence?

In deciding the Free Exercise claim, the Court of Appeals recognized the applicability of RFRA but then stated the test as:

> . . . whether [the] regulation substantially burdens a sincerely held religious belief; whether the burden is justified by a compelling state interest; and *whether the regulation is narrowly tailored to achieve that interest.*

48 F.3d at 1122 & n.2 (emphasis added). However, RFRA mandates:

> Government may substantially burden a person's exercise of religion only if it demonstrates that *application of the burden to the person* — (1) is in furtherance of a compelling governmental interest; and (2) *is the least restrictive means of furthering that compelling governmental interest.*

42 U.S.C. § 2000bb-1(b) (emphasis added). Moreover, the Court of Appeals blindly accepted this Court's decision in *United States v. Lee*, 455 U.S. 252 (1982) (a *pre-Smith, pre-*RFRA case), as reliable *and controlling* authority in determining Petitioner's rights under RFRA. *See* 48 F.3d at 1122-23 n.2. Applying *Lee* and its progeny, the Court of Appeals rejected Petitioner's Free Exercise claim. *See* 48 F.3d at 1122-24.

The Ninth Circuit's focus on the *regulation* rather than its *application* and on *pre-Smith* cases rather than on *statutory interpretation* threatens to reduce RFRA to a legislative repudiation of the result in a single case rather than a "sweeping, breathtaking new federal civil rights statute." Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 Mont. L. Rev. 249, 251 (1995). In light of the logic, structure and express provisions of RFRA, Petitioner's free exercise claim is not just a challenge to Section 1402(g)'s limited exemption for "members only" but also an independent claim of right under an exemption statute that applies with full force to the Internal Revenue Code. *See* Paulsen, 56 Mont. L. Rev. at 273 ("Congress did not exempt the tax code from RFRA.").

The Court of Appeals erred in failing to apply the statutory mandate of RFRA to the Government's refusal to accommodate Petitioner's free exercise of religion. Section 1402 contains a myriad of exemptions from the payment of Social Security taxes, including two religious exemptions: one for ministers, members of religious orders, and Christian Science practitioners and one for members of a "recognized religious sect." See 26 U.S.C. § 1402(e) & (g).[3] Under RFRA, a governmental interest cannot be "compelling" where is not uniformly pursued wherever it arises:

> It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order'. . . when it leaves appreciable damage to that supposedly vital interest unprohibited."

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[3] It also should be noted that it is not a crime to refuse to obtain a Social Security number and thereby refuse to participate in the Social Security system.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2234 (1993) (*quoting The Florida Star v. B.J.F.*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and concurring in judgment). Because RFRA incorporates the "compelling interest" test *"as set forth in* Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1963)," 42 U.S.C. § 2000bb(b)(1) (emphasis added), RFRA mandates rigorous application of that test.

United States v. Lee is the "leading exhibit" in the category of pre-*Smith* cases in which the Court watered down the "compelling interest" test to hold that a governmental interest was compelling even though not consistently pursued. *See* Paulsen, 56 Mont. L. Rev. at 266. Given that Petitioner seeks only an individual exemption from the payment of Social Security taxes on the basis of his personal religious beliefs, "the government's assertion of a compelling interest in *mandatory, uniform* participation is belied by the failure of the government to pursue that interest consistently in closely analogous circumstances." *Id.* at 267.

Nor can the limitation of a religious exemption from payment of Social Security taxes only to ministers and members of a"recognized religious sect" become a compelling governmental interest merely because Congress put the exemption into the form of a federal statute. *Id.* at 270-73. RFRA "applies to all Federal ... law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act." 42 U.S.C. § 2000bb-3(a). RFRA contains no exceptions to its applicability to the tax code, and Section 1402(g) therefore cannot be accepted as the final word on the appropriate balance between religious liberty and the needs of the Social Security system.

Finally, the costs, inconvenience and difficulty of granting exemptions from the payment of Social Security taxes cannot constitute a "compelling interest" within the meaning of RFRA.

"RFRA is a congressional mandate that federal agencies make the effort, and bear the cost, of accommodating sincere religious exercise, with all the difficulties that that may entail for government." Paulsen, 56 Mont. L. Rev. 274 (emphasis in original). As this Court recognized in *Sherbert*, administrative ease and even the government's interest in a sound public fisc cannot be "compelling interests" until it is proven that individual religious exemptions would pose a grave threat to the Social Security system. Here, as in *Lee*, there is no evidence of how many people may have religious objections to the payment of Social Security taxes, no evidence of how many of them would seek an exemption, no evidence of how an exemption coupled with a waiver of benefits threatens the system, and no evidence that the Social Security system is of "paramount" importance.

The Court of Appeals failed to consider any of the foregoing when it decided that *Lee* was controlling authority in the analysis of Petitioner's rights under RFRA. In short, the Court of Appeals assumed that RFRA merely incorporates by reference the Court's pre-*Smith* free exercise jurisprudence and, by its decision in *Droz*, translated that assumption into controlling federal law for the nine states comprising the Ninth Circuit and persuasive authority for that proposition in the remaining forty-one. The Court of Appeals, in a footnote, thus decided a question of federal law which has not been, but should be, decided by this Court. Therefore, under Rule 10.1(c) of the Rules of the Supreme Court of the United States, special and important reasons exist for the exercise of the Court's discretion in granting the Petition.

CONCLUSION

For these compelling reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed or, in the alternative, summarily vacated by an order also remanding the case to the Court of Appeals for consideration of the issues raised herein under Supreme Court Rule 16.1.

Respectfully submitted,

Anne-Marie Amiel
Counsel of Record
Dean L. Whitford
John W. Whitehead
The Rutherford Institute
1445 E. Rio Road
Charlottesville, Virginia 22901
(804) 978-3888

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